

# **EXHIBIT 5**

ORIGINAL

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-----X  
IN THE MATTER OF  
MADOFF CHARITIES INVESTIGATION  
-----X

120 Broadway  
New York, New York

January 30, 2009  
10:02 a.m.

EXAMINATION UNDER OATH of J.  
EZRA MERKIN, pursuant to Subpoena, held at  
the above place, date and time, before  
Alice Schulman, a Notary Public of the  
State of New York.

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A. I believe.

Q. And describe how that came about.

A. We had had several conversations, meetings or telephone in which he described market making activities in his office and money management activities in his office.

He walked through a strategy that he was then interested in executing on behalf of clients, and the decision came about that it made sense to allocate some capital to him and invest some capital in those strategies.

Q. What was the strategy he described to you?

A. At that time the strategy involved the purchase of individual stocks, preponderantly the purchase of individual stocks, puts were beneath them and the puts were to be bought, the calls were to be sold and the stocks were to be bought. So you would long a stock, long a put option that would have a strike price

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2 beneath the price of that stock and short  
3 a call that had a strike price above the  
4 price of the stock.

5 The put and the call had the  
6 same expiration dates, the options had the  
7 same expiration dates.

8 Q. Is there a name associated with  
9 that strategy?

10 A. If it's done on individual  
11 stocks, it might be called a split strike  
12 strategy. It might be called buying the  
13 puts, writing the calls, something like  
14 that.

15 Q. And had you done the strategy  
16 yourself?

17 A. We had looked at options related  
18 strategies and options arbitrage of  
19 related strategies in which they thought  
20 there may be some market inefficiencies  
21 between premiums or premium on puts and  
22 calls relative to stocks. I don't think  
23 we had done much with it.

24 Q. And the split strike strategy,  
25 is that one that stayed constant

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2 Q. Just to clarify, what I'm  
3 understanding you to say, and tell me if  
4 this is a fair characterization, the play  
5 in execution was for the vast most part in  
6 the option trading, and the option trading  
7 that was over-the-counter or unreportable?

8 A. If you permit me to edit what  
9 you said, I would take out vast. I would  
10 say for the most part, I'm not sure I  
11 would say the vast most part. That was  
12 formidable on his stocks.

13 Maybe this is worth a word or  
14 two. When you said Madoff was a legend,  
15 he was a legendary person, he was. I  
16 don't know if you were saying that  
17 seriously or facetiously.

18 MR. LEVANDER: We are talking  
19 about a legend of one kind pre  
20 December 11th.

21 A. Fair enough. You're talking  
22 about a guy who had a broker-dealer  
23 license for 38 years. You're talking  
24 about somebody who had massive market  
25 share. He was the guy that took on the

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New York Stock Exchange and eventually won. They had hegemony. He shed them of it. He did it by basically being a wholesale upstairs trader.

He would say to me routinely if I asked him regularly, which doesn't mean every time but reasonably frequently, what percentage of the New York Stock Exchange volume are you doing today. The answer was low teens, sometimes eight or nine.

At the beginning he was the source, he was the beneficiary of the Stock Exchange off-board trading room. So if you were a member firm, if you were Merrill Lynch, I'm picking on Merrill, it's not meant to be any specific example, you could not change New York Stock Exchange stocks other than through the floor, originally 24 hours a day, and then nine to four.

He didn't have a seat. He wasn't a member firm, so he could do the upstairs trading all day, every day. The 13 percent sounds like an incredibly high

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figure but it's really incredibly understated because that's the whole stock exchange trading in the 150 (check) names that he cared about he could be 40 percent of the volume.

When we were in the merger arbitrage business, okay, when there was just more to do in the merger arbitrage business, which has relevance to Bernie's strategy, we would occasionally get a name which was Bernie's name, Pfizer is buying Wyeth. If Wyeth was a name of Bernie's 150 names, he was 40 or 50 percent of the volume in the wholesale area, not in what we were doing together but in that incredible market making business he had, and that was the real legend.

And at the end of the Madoff investigation we'll find out if the market making business was for real or not real, but I bet you it was. This is just a hunch. That was where a lot of the executions came and it played off on options, that's where you really had

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the --

MR. LEVANDER: To put it in perspective, we have given you, among other things that we've given you, articles that were thrown into the due diligence file. And if you look at those articles in 1990, and I may be off, but I think this is right, the Wall Street Journal and New York Times said that five entities got together to create an electronic trading exchange. Those were Citi, which were Soloman Smith Barney, Merrill, Goldman Sachs, Morgan Stanley and Bernie Madoff. And that's the scope and stature he had in that business.

MR. CORNGOLD: I think we understand that.

MR. LEVANDER: Fine. I'm trying to be helpful.

A. I would only amend what Andy said. You look at him and tick off his fingers, those four were half the business, he was the other half. He

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wasn't 20 percent. Those four guys came to him and said would he like to do a joint venture on the market making side.

EXAMINATION BY

MR. SANGEAP:

Q. Was he a market maker in options?

A. I think the answer is yan, meaning yes and no. Bernie didn't boast much. Bernie claimed to me he had a very significant role in inventing the OEX.

If you know about the history of options, it would be a very big thing. I asked a couple of guys in Chicago, I said is this right or wrong, they said more right than wrong. This is all third-hand conversations. They don't mean a lot.

He had a significant volume in options that he was doing as a market maker, significant volume when the big board refused to let their floor specialists make markets in options in the names that they were specialists in at the same time.

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It was called side-by-side market making, and it was forbidden on the floor. For whatever policy reasons that I don't know, and the little I do know don't make a lot of sense. So when he had this, when the cartel gave him this opportunity, he sat and made options.

This goes back quite awhile, but I remember a visit to Bernie and his traders when he showed me what they called a Madoff screen which was a proprietary screen on which they spent fortunes every year upgrading and keeping up the same thing where they would show stocks and their options on the same screen. It was like a quarter panel that was the options screen, and they were making option markets in the options. But those were in stocks and not necessarily OEX's.

Later on, I mean later on the whole thing changed. Later on the off-board trading changed. Nothing stays that static in markets. The whole New York Stock Exchange thing, and that was a

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2 lot of conversations, where do changes in  
3 these markets bring the strategy.

4 Q. Just focussing on the last five  
5 years. Are you aware of whether Mr.  
6 Madoff made a market in --

7 A. OEX's?

8 Q. -- OEX's or the 100 stocks --

9 MR. LEVANDER: Let him finish  
10 his question.

11 Q. -- stock options?

12 A. I don't know for sure.

13 Q. Did you have any conversations  
14 with him concerning whether he made  
15 markets for S&P 100 options?

16 A. My most recent conversation with  
17 him about that subject, okay, was so near  
18 the end that I'm not sure today I believe  
19 anything said in, in the fourth quarter of  
20 '08. It was either October or November.

21 Q. What did he say in that  
22 conversation?

23 A. We had a conversation about the  
24 contraparty risk in the puts, what  
25 percentage of listed puts I was using

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